

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,)	No. 63742-8-I
)	
Respondent,)	
)	
v.)	
)	
YUSSUF HUSSEIN ABDULLE,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: May 3, 2010
)	

Ellington, J. — When a defendant denies waiving the right to counsel and the State fails, without explanation, to call other officers who were present to corroborate the interrogating officer's testimony, the defendant's statements are inadmissible. In this case, the State presented the testimony of only one of two officers present when Yussuf Abdulle waived his right to counsel and made incriminating statements. The court therefore erred in admitting the statements at trial. We reverse.

FACTS

On June 9, 2008, two payroll checks disappeared from the outgoing mail basket placed in the front office at Puget Sound Security (PSS) in Bellevue. Later that day, a man tried to deposit the two checks, endorsed to one Hiback Omar, in a Bank of America account in the same name. Surveillance video showed the man at the Bank of America First Hill branch at 12:12 p.m. and at the International District branch at 12:30

p.m.

Bellevue Police Detective Steven Hoover's investigation focused on Yussuf Abdulle, a former PSS employee who had been recently fired. Abdulle had spent about 30 minutes alone in the PSS front office the morning the checks disappeared.

On August 13, 2008, Hoover arrested Abdulle and transported him to the Bellevue Police Department in an unmarked sedan driven by Detective Rich Newell. At some point during the drive, Abdulle allegedly informed Hoover that he would talk in exchange for a cigarette and a drink of water. Abdulle allegedly confessed upon arriving at the station. The State charged Abdulle with two counts of forgery.

At a CrR 3.5 hearing, Hoover testified that after he arrested Abdulle, he placed him in the back of his unmarked car. Hoover then sat next to Abdulle and Newell drove the car. The car did not have a "silent partner" or any other kind of screening.¹ Hoover asked Abdulle about his background to see if he understood English. He then read Abdulle his Miranda² warnings. Hoover told Abdulle they needed to talk about the checks he took from the PSS and tried to deposit. Abdulle denied taking the checks or cashing them. When Hoover replied that he had surveillance photographs from the two banks, Abdulle said he wanted to talk to an attorney. Hoover then informed Abdulle that if he wanted to talk, he would have to contact Hoover. Afterward, he and Abdulle engaged in "chit-chat," but Hoover did not ask questions about the case, about Abdulle's immigration status, or show Abdulle surveillance photographs.

While still en route, Abdulle told Hoover he would talk in exchange for a cigarette

¹ Report of Proceedings (RP) (May 11, 2009) at 10.

² Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

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and a glass of water. When they arrived in the police station garage, Hoover asked

Abdulle if he was sure he wanted to talk, as he had asked for an attorney. Abdulle said yes. Hoover could not recall whether they were still inside the car when this exchange occurred, or whether they were standing outside the car. After they all got out of the car, Newell went to bring Abdulle water and a cigarette.

Abdulle told Hoover that PSS was “out to get him” and he was fired for no reason.³ He said he was mad and needed some money, so he took a check and tried to cash it at a bank in Chinatown.⁴ When Hoover pointed out that two checks were stolen and he had tried to deposit them at two banks, Abdulle said he only remembered one check and one bank. Hoover then showed Abdulle two surveillance photographs from the two banks. Abdulle confirmed he was the person in both photographs. Hoover asked who Hiback Omar was and Abdulle said he was his cousin.

At the hearing, Abdulle gave a significantly different account. Once he was placed in the car, Hoover told him there was a lot of evidence against him. Abdulle denied taking any money. They were already on the freeway when Hoover read Abdulle his Miranda rights, after being told to do so by Newell.

Abdulle requested an attorney. Hoover, however, continued to ask him questions and show him photographs. He also told Abdulle that he would not be deported to Somalia because he is a United States citizen.

Abdulle did not agree to talk to Hoover in exchange for a cigarette and a glass of water. When they arrived at the police station, Abdulle asked Hoover to return a

³ RP (May 11, 2009) at 22.

⁴ When Abdulle said Chinatown, Hoover understood he meant the International District neighborhood of Seattle.

cigarette he had taken from him. Hoover returned the cigarette. Hoover never asked Abdulle whether he was sure he wanted to talk, and continued to ask Abdulle questions, including what he would have done with the money. Abdulle replied that was a trick question and again said he needed an attorney.

The court found Hoover's testimony more credible and reliable than Abdulle's and ruled the statements admissible. The State amended the information to add a first degree theft charge.

Abdulle appeals.

DISCUSSION

Abdulle contends the court erred in admitting his custodial statements into evidence at trial. He argues the State failed to meet its burden of proving that he waived his right to counsel because the only evidence the State presented at the CrR 3.5 hearing was Hoover's uncorroborated testimony.

Custodial statements made by an accused are inadmissible unless preceded by a full advisement of rights and a knowing, intelligent and voluntary waiver of rights, including the right to remain silent and the right to have counsel present at questioning.⁵

When the defendant indicates he wants an attorney, "[i]f the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."⁶ As interpreted by our Supreme Court in State v. Davis⁷ and State v. Erho,⁸

⁵ U.S. Const. amend. V; Miranda, 384 U.S. at 469–73.

⁶ Id. at 475.

that “heavy burden” requires that the State not rest its case on a “swearing contest” when a defendant disputes the giving of the Miranda warnings, but must offer corroborating testimony of other officers present during apprehension or custody if any such evidence exists.⁹ The rationale underlying the holdings in Davis and Erho is akin to the missing witness rule:

[W]here a witness is under the control of the party presenting evidence and is not called and no explanation is given for that failure, the trier of fact may entertain an inference that the testimony of the missing witness would have been adverse. In the context of a suppression hearing based on Miranda, that inference is sufficient to tip the scales in favor of the accused, where the State offers no explanation of its failure to call the witness. In such instances, the State cannot meet its burden as a matter of law, unless there is sufficient other evidence to overcome the inference.^[10]

In State v. Haack, this court clarified that the State need not present independent corroboration “in every instance in which the defendant disputes the giving of the warnings and intelligent waiver of the right to remain silent.”¹¹ Rather, “where such independent evidence exists, it must either be presented or the State must explain on the record why the evidence is not being presented.”¹²

Here, the State rested its case upon a “swearing contest” between Detective Hoover and Abdulle. The State did not call Detective Newell to corroborate Detective Hoover’s testimony, and failed to explain on the record whether he was available to

⁷ 73 Wn.2d 271, 438 P.2d 185 (1968).

⁸ 77 Wn.2d 553, 463 P.2d 779 (1970).

⁹ Davis, 73 Wn.2d at 284–88; Erho, 77 Wn.2d at 559.

¹⁰ State v. Haack, 88 Wn. App. 423, 433–34, 958 P.2d 1001 (1997).

¹¹ Id. at 433.

¹² Id.

testify.

The State contends Abdulle waived this argument because he failed to raise the issue below. But it is the State's burden to present available corroborating evidence or explain its absence. By failing to do either, the State failed to present sufficient evidence of waiver.

The State also argues that the record does not establish that Newell actually heard any part of the conversation between Abdulle and Hoover, and therefore there is no “missing witness.” Again, it is the State’s burden to ensure that the record reflects that none of the other officers present heard the Miranda warnings or the defendant’s waiver.¹³ Newell was present during the giving of the warnings and during at least part of the subsequent conversation. That Newell heard some or all of the conversation is a reasonable inference, and it was the State’s burden to prove otherwise.

The court erred in admitting Abdulle's statements. The State does not argue the error was harmless.

Reversed and remanded for a new trial.

Edenborn, J

WE CONCUR:

Leach, A.C. J.

Four, J.

¹³ See Erho, 77 Wn.2d at 558–59.

